



The Equality Act's Direct Assault on All Americans' Religious Freedom

BY KIM COLBY

The Equality Act (EQA)¹ is an unqualified disaster for all Americans' religious freedom, as well as for their individual freedom. The proponents of the EQA deny that it harms religious freedom, but a plain reading of its text shows that the denials simply are not true.

The EQA opens up the Civil Rights Act of 1964 to insert “sex, sexual orientation, and gender identity” as protected classes throughout its provisions. Recall that the Civil Rights Act is composed of “titles,” each title addressing discrimination in different contexts (e.g., public accommodations (Title II), education (Title IV), federal financial assistance (Title VI), employment (Title VII), and housing (Title VIII)). All of the titles prohibit discrimination on the basis of three protected classes: race, color, and national origin.

Some titles also add “sex” or “religion” as protected classes. The titles that add sex or religion may also include a religious exemption. For example, Title VII prohibits employment discrimination on the basis of race, color, national origin, sex, and religion; and it has a strong exemption for religious employers as to discrimination based on religion. It also only applies to employers with fifteen or more employees. On the other hand, Title II prohibits discrimination on the basis of race, color, national origin, and religion in public accommodations, but it does not have a religious exemption or other limitations.

Should the Equality Act pass, the courts will have an important role in interpreting its terms and determining its scope. But I believe the following concerns are a legitimate interpretation of its current text, particularly in light of recent decisions, such as the Supreme Court's 2020 decision in *Bostock v. Clayton County*.²

Four Overarching Concerns

1. Religious Freedom Restoration Act Eviscerated:

Proponents misrepresent the EQA when they insist it has no impact on religious freedom because it leaves in place the Civil Rights Act's existing religious exemptions for employment and housing. *But the EQA explicitly rescinds the Religious Freedom Restoration Act's protections.* The EQA states: "'The Religious Freedom Restoration Act of 1993 (42 U.S.C. 2000bb et seq.) shall not provide a claim concerning, or a defense to a claim under, a covered title, or provide a basis for challenging the application or enforcement of a covered title.'"³

The EQA utilizes a simple formula for determining winners and losers: any LGBT claim, no matter how unfounded, trumps any religious freedom defense, no matter how strong. Consider how radical that proposition is.

If the government brings a claim against a religious school for discrimination on the basis of sexual orientation or gender identity because it denies admission to a high school student who dates a person of the same sex or who insists on using the locker room of the opposite sex, the school cannot use the Religious Freedom Restoration Act as a defense. The school can only use the First Amendment to defend itself even though the Religious Freedom Restoration Act is the single most important protection for all Americans' religious freedom at the federal level and generally more potent than the First Amendment.⁴

2. Abortion: The EQA adds "sex" to several titles that did not previously include "sex" as a protected class, including public accommodations (Title II) and federal financial assistance (Title VI). The EQA specifies that "sex" includes "pregnancy, childbirth, or a related medical condition."⁵ It further states that "pregnancy, childbirth, or a related medical condition shall not receive less favorable treatment than other physical conditions."⁶

While it does not say so explicitly, there is a reasonable basis for believing that abortion would be considered "a related medical condition." If so, abortion will be protected as a civil right under the Civil Rights Act, a deeply concerning development.⁷ This concern finds support in the fact that Title VII and Title IX, the two leading federal civil rights laws that prohibit sex discrimination, include "abortion neutral" language that counters an

inference that their prohibition on sex discrimination requires the provision or coverage of abortion.⁸ Because the EQA does not include an "abortion neutral" provision, a court could infer that Congress intended to protect abortion because it clearly knew how to add "abortion neutral" language if it wished to do so. In addition, at least one federal appellate court and a federal regulation have interpreted "related medical condition" to include abortion.⁹

3. Gender Identity: The EQA defines "gender identity" to be basically unlimited: "The term 'gender identity' means the gender-related identity, appearance, mannerisms, or other gender-related characteristics of an individual, regardless of the individual's designated sex at birth."¹⁰ It is hard to see how this nebulous definition can be administered in any meaningful way.

4. Tax Exemption: Although the EQA does not address the tax-exempt status of religious nonprofits, some religious freedom advocates are concerned that it could be used to justify revocation of the tax-exempt status for religious nonprofits with traditional beliefs regarding marriage, sexual conduct, and sexual identity. In the EQA's findings, Congress "finds" that "[b]ecause discrimination based on sexual orientation or gender identity in-

herently is a form of sex discrimination, as held in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), this Act furthers the *compelling government interest* in providing redress for the serious harms to mental and physical health, financial security and wellbeing, civic participation, freedom of movement and opportunity, personal dignity, and physical safety that result from discrimination."¹¹ Mindful of former Solicitor General Verrilli's response in *Obergefell v. Hodges* that tax-exempt status for religious colleges might be an issue if same-sex marriage were recognized to be a constitutional right,¹² some religious freedom advocates fear that the EQA would be interpreted as elevating sexual orientation and gender identity to the same status as race, that is, a compelling interest of the first order. They fear that the EQA lays the groundwork for revocation of religious nonprofits' tax-exempt status using the rationale of *Bob Jones University v. United States*.¹³

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President Clinton signs the Religious Freedom Restoration Act on November 16, 1993, surrounded by some of its congressional sponsors, including then-Representative Charles Schumer and Representative Jerrold Nadler.

Repurposing the Civil Rights Act of 1964 Title-by-Title

Title II – Public Accommodations: The EQA would expand the number of protected classes in Title II from the original four classes (race, color, national origin, and religion)¹⁴ to seven classes by adding three new classes (sex, sexual orientation, and gender identity). The addition of these new classes creates a clash with the rights of many Americans’ religious beliefs that did not previously exist when Title II’s protection focused on “race, color, national origin, and race.” The addition of “sex,” for example, is problematic because of various spaces that are limited to males or females, such as bathrooms or locker room facilities. And the addition of sexual orientation creates problems for wedding vendors. Yet no religious protections have been added to address these and other new problems.

Another problem results from the EQA’s breathtaking expansion of the federal definition of a “public accommodation.” Currently, Title II applies to businesses in four categories: places to eat, lodging, gas stations, and places of public entertainment, such as theaters. Note that houses of worship, religious schools, and religious nonprofits would not readily fall into any of these categories. But that changes with the EQA’s radical new understanding of what and who constitute a public accommodation.

The EQA redefines “public accommodation” to include not just every organization, regardless of whether it is commercial or noncommercial, but *individuals* as well. The EQA defines “public accommodation” to include “any establishment that provides a *good, service, or program*.”¹⁵ It then mandates that “establishment” “shall be construed to include an individual whose operations affect commerce and *who is a provider of a good, service, or program*.”¹⁶ And the EQA explicitly states that it “shall not be construed to be limited to a physical facility or place.”¹⁷ Unlike the current Title II, the EQA regulates *nonphysical* places, *non-commercial* activities, and *any individual* who provides a good, service, or program that affects commerce.

Recall that, unlike Title VII, which applies to employers only if they have fifteen or more employees, Title II does not have a numerical limit to its reach. It is no exaggeration to say that the EQA makes *every American a potential public accommodation*. That is a breathtaking expansion of federal power.

In addition to its definition of an “establishment” for purposes of a public accommodation, the EQA increases the scope of the public accommodations law by adding two new lists of covered “establishments” to Title II’s current list of covered “establishments.” The first list expressly adds “place of or establishment that provides exhibition, entertainment, recreation, exercise,

amusement, public gathering, or public display.”¹⁸ A place or establishment that provides “public gathering” would seem to include houses of worship unless they limit their activities to “members only,” which few churches do. The second list further specifies that “establishment” includes “a store, shopping center, online retailer or service provider, salon, bank, gas station, food bank, service or care center, shelter, travel agency, or funeral parlor[,]” as well as providers of “health care, accounting, or legal services” or any transportation.¹⁹ It should be noted that the second list is not exclusive but merely illustrative of an “establishment that provides a good, service, or program.”

EQA proponents assert that the First Amendment will protect houses of worship from any negative side effects of Title II’s expansion. But the First Amendment’s protections are limited after the Supreme Court’s 1990 decision of *Employment Division v. Smith*.²⁰ And even the limited ways in which the First Amendment would provide protection to religious persons are increasingly under pressure from persons who oppose religious freedom.²¹ Instead, the primary protection for religious congregations, schools, and nonprofits would be the Religious Freedom Restoration Act – except that the EQA explicitly denies the Religious Freedom Restoration Act’s protections to religious persons and congregations.²²

Title VI – Federal Financial Assistance: Title VI is an extraordinarily potent federal law that states: “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”²³ The definition of *program or activity* is very broad. Essentially, an entity that takes any federal financial assistance cannot discriminate in any of its programs or activities, even if those programs or activities do not receive federal funding.

Title VI is strong medicine as is appropriate for race, color, or national origin discrimination. But the EQA would double the number of protected classes in Title VI by adding “sex, sexual orientation, and gender identity.” The addition of these classes

poses particular problems for religious freedom without adding any protections for religious freedom.

Note that the addition of “sex” to Title VI will effectively subsume Title IX, the current statute that prohibits sex discrimination in educational institutions.²⁴ Unlike Title IX, however, which has a broad exemption for religious educational institutions,²⁵ Title VI has no protection for religious entities.

As a result, various religious nonprofits that serve as providers of social services will be subject to discrimination claims under Title VI if they receive even minimal federal financial assistance. A religious school that participates in the federal school lunch

program will find all of its programs and activities subject to Title VI’s prohibition on discrimination on the basis of sexual orientation and gender identity. A religious congregation that accepts federal security grants, historic preservation grants, or FEMA funding to repair hurricane damage to its house of worship will likewise be subject to Title VI’s expansive prohibition on sexual orientation or gender identity. A religious college that receives federal research grants or whose students receive federal financial aid will likewise be

subject to severe restrictions regarding sexual orientation and gender identity. Faith-based homeless shelters will not be able to structure their programs to serve only biological women in their facilities. A religious agency that places children for adoption or foster care will have its ability to choose families that align with its religious beliefs regarding marriage restricted. A religious hospital or doctor will have to provide gender transition surgeries and drugs, and perhaps even abortions. A religious nonprofit that administers a federal grant will forfeit its ability to conduct its activities and programs, even those not receiving federal financial assistance, in accordance with its religious beliefs.

Title VII – Employment: Title VII prohibits discrimination in employment on the basis of race, color, national origin, religion, or sex.²⁶ Given the Supreme Court’s decision in *Bostock v. Clayton County*,²⁷ the EQA is mostly redundant in its addition of “sexual orientation and gender identity” as protected classes for purposes of Title VII. In *Bostock*, the Court reinterpreted Title VII’s prohibition on “sex” discrimination to include

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“sexual orientation and gender identity,” accomplishing through the Court what the EQA supporters had been unable to persuade Congress to do. The *Bostock* majority, however, emphasized that the *Bostock* case did not involve a religious employer or religious freedom claim, and that religious freedom claims or defenses could be brought under the First Amendment, the Religious Freedom Restoration Act, and Title VII’s extant religious exemptions.²⁸

Title VII has four relevant exemptions, two specifically for religious employers and two for all employers. The first protects religious associations’ right to employ only “individuals of a particular religion.”²⁹ The second protects religious educational institutions’ right to employ only “employees of a particular religion.”³⁰ These exemptions should provide broad protection for a religious employer to take into account whether an employee’s conduct, for example, entering a same-sex marriage, violates the employer’s religious standards for employees. But liberal academics are pushing for these exemptions to be restricted to allowing an employer to ascertain whether the employee or job applicant belongs to the employer’s faith, but not whether the employee conducts herself according to the employer’s faith requirements. In other words, a Baptist college could ask an applicant for a faculty position whether she is a Baptist; but if she affirms that she is, the college could not refuse to hire her if she is living with her boyfriend or has married another woman. The scope of these religious exemptions is already becoming a matter of litigation.

The third exemption, which applies to all employers, is that Title VII only applies to employers of fifteen or more employees.³¹ The fourth exemption is the BFOQ exemption, which allows any employer to hire on the basis of religion, sex, or national origin “where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.”³² The EQA expressly modifies the BFOQ exemption by expressly stating that “in a situation in which sex is a bona fide occupational qualification, individuals are recognized as qualified in accordance with their gender identity.”³³ The transgender person, not the employer, determines whether the BFOQ applies.

Title VIII – Housing: Title VIII, the Fair Housing Act, prohibits discrimination in housing based on race, color, national origin, religion, sex, handicap, or familial status.³⁴ The EQA would add sexual orientation and gender identity as protected classes. Title VIII has an existing religious exemption that allows “a religious organization, association, or society” to “limit[] the sale, rental or occupancy of dwellings which it owns or operates for other

than a commercial purpose to persons of the same religion, or from giving preference to such persons, unless membership in such religion is restricted on account of race, color, or national origin.”³⁵

Religious nonprofits, such as nursing homes and homeless shelters that provide shelter for persons regardless of their faith but wish to manage that housing according to their religious beliefs, including beliefs about marriage, sexual conduct, and gender identity, will face new challenges under the EQA. Religious colleges will face challenges regarding sexual orientation in their management of their married student residences and regarding gender identity in their management of single-sex dormitories. The EQA provides no additional religious protections to address these problems. Furthermore, the addition of sexual orientation and gender identity to Title VI means that religious nonprofits providing housing will face new challenges under Title VI, which has no religious exemption, even if the existing Title VIII exemption provides protection.

Conclusion

This is not a comprehensive discussion of the EQA; however, this examination of the EQA should be enough to alert religious Americans to the dangers posed by the EQA to all Americans’ religious freedom.

Because of the obvious danger that the EQA poses to religious freedom, some members of Congress have spoken of the need for a compromise measure that would offer some protections for religious freedom while amending the Civil Rights Act to include sexual orientation and gender identity.

There is great debate among religious advocacy groups as to whether compromise legislation is possible or desirable, but stopping the EQA must be the first priority for all religious freedom supporters.



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END NOTES

- 1 On February 25, 2021, the United States House of Representatives passed the Equality Act, H.R. 5, by a vote of 224-206. All Democrats and three Republicans voted in favor of the Act, while all opposing votes were cast by Republicans. The House-passed version of H.R. 5, as placed on the Senate calendar, is at <https://www.congress.gov/117/bills/hr5/BILLS-117hr5pcs.pdf>. At present, a Senate version, S. 393, has 49 co-sponsors, all the Democratic senators save one, and no Republican co-sponsors. The EQA is not expected to pass the Senate if the filibuster remains in place, but that is a huge “if.”
- 2 140 S. Ct. 1731 (2020).
- 3 H.R. 5, § 9(2)(b)(3) (“Sec. 1107.Claims”).
- 4 For an explanation as to why the Religious Freedom Restoration Act offers stronger protection than the First Amendment, see Kim Colby, “The Religious Freedom Restoration Act: A Complicated Legacy for Justice Antonin Scalia”, *Outcomes*, Summer 2016, 32-33, [https://www.clsreligiousfreedom.org/sites/default/files/site_files/Center%20Other/Outcomes%20-%20Summer%202016%20Colby%20feature%20\(002\).pdf](https://www.clsreligiousfreedom.org/sites/default/files/site_files/Center%20Other/Outcomes%20-%20Summer%202016%20Colby%20feature%20(002).pdf). See also, Kim Colby, *Symposium: Free Exercise, RFRA, and the Need for a Constitutional Safety Net*, (Aug. 10, 2020), <https://www.scotusblog.com/2020/08/symposium-free-exercise-rfra-and-the-need-for-a-constitutional-safety-net/>.
- 5 H.R. 5, § 9(2)(a)(4)(B); § 9(2)(b)(1) & (b)(3)(a)(1).
- 6 *Id.* § 9(2)(b)(1).
- 7 For a detailed discussion of the Equality Act and abortion, see Richard Doerflinger, *The “Equality Act”: Threatening Life and Equality*, (Jan. 14, 2021), <https://lozierinstitute.org/the-equality-act-threatening-life-and-equality/>. See also, U.S. Conference of Catholic Bishops, *The Equality Act: Its Impact on Government Funding of Abortion*, (Feb. 2021), <https://www.usccb.org/about/pro-life-activities/upload/Equality-Act-PL-Hyde.pdf>.
- 8 42 U.S.C. § 2000e(k); 20 U.S.C. § 1688.
- 9 *Doe v. C.A.R.S. Protection Plus*, 527 F.3d 358, 364 (3d Cir. 2008); 29 C.F.R. § 1604.10, App.
- 10 H.R. 5, § 9(2)(a)(2).
- 11 H.R. 5, § 2(a)(22) (emphasis added).
- 12 Transcript of Oral Argument at 38, *Obergefell v. Hodges*, 576 U.S. 644 (2015) (“JUSTICE ALITO: Well, in the Bob Jones case, the Court held that a college was not entitled to tax-exempt status if it opposed interracial marriage or interracial dating. So would the same apply to a university or a college if it opposed same-sex marriage? GENERAL VERRILLI: You know, I don’t think I can answer that question without knowing more specifics, but it’s certainly going to be an issue. I don’t deny that. I don’t deny that, Justice Alito. It is going to be an issue.”) (cleaned up).
- 13 461 U.S. 574 (1983).
- 14 Title II is found at 42 U.S.C. §§ 2000a-2000a-6.
- 15 H.R. 5, § 3(a)(2)(C).
- 16 H.R. 5, § 3(c).
- 17 *Id.*
- 18 H.R. 5, § 3(a)(2)(A).
- 19 H.R. 5, § 3(a)(2)(C).
- 20 494 U.S. 872 (1990).
- 21 For example, in *Hosanna-Tabor Evangelical Church & School v. EEOC*, 565 U.S. 171 (2012), the Solicitor General, the federal government’s second highest lawyer, argued that the Free Exercise Clause did not protect the right of a religious congregation to fire ministers if the minister asserted a claim under federal nondiscrimination laws. That argument lost 9-0 when the Supreme Court ruled that the First Amendment included the “ministerial exception,” the right of churches or religious schools to determine the leaders who would carry out their mission. But some federal judges continue to limit this First Amendment protection as much as possible.
- 22 See *supra* notes 3 and 4 and accompanying text.
- 23 Title VI is found at 42 U.S.C. §§ 2000d-2000d-7.
- 24 20 U.S.C. §§ 1681-1688.
- 25 *Id.* § 1681(a)(3) (protecting religious institutions of higher education when Title IX’s requirements conflict with an institution’s religious tenets); 34 C.F.R. § 106.12 (same).
- 26 Title VII is at 42 U.S.C. §§ 2000e-2000e-17.
- 27 40 S. Ct. 1731 (2020).
- 28 *Id.* at 1753-54. In a dissent joined by Justice Thomas, Justice Alito examines the troubling religious freedom consequences of the majority’s addition of sexual orientation and gender identity to Title VII. *Id.* at 1754, 1780-82 (Alito, J., dissenting).
- 29 42 U.S.C. § 2000e-1(a).
- 30 *Id.* § 2000e-2(e)(2).
- 31 *Id.* § 2000e-(b).
- 32 *Id.* § 2000e-2(e)(1).
- 33 H.R. 5, § 7(b)(3).
- 34 The Fair Housing Act is at 42 U.S.C. §§ 3601-3619.
- 35 42 U.S.C.A. § 3607(a).

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